The "Burgh" Courts, which were formerly of considerable importance, are now insignificant, their jurisdiction mainly consisting in the cognisance of trifling criminal causes.

T. W. D.

RECENT AMERICAN DECISIONS.

Superior Court of Cincinnati.

BAILEY *v.* BERRY ET AL.

Joint trespassers may be sued together, or any of them separately, and the non-joinder of the others is no defence.

A release to one of several joint trespassers will discharge all; but it must be a technical release, not merely a covenant not to sue, or other instrument amounting to a release by implication merely.

Where plaintiff sued joint trespassers and then made an agreement with a portion of them to withdraw the suit as to them for a certain sum of money, and in pursuance of this agreement made an entry on the record that he was unwilling further to prosecute his action against the parties named, and as to them the action was dismissed, *held*, that the others were not discharged, but they were entitled to have the jury instructed, in making up their verdict to deduct the amount received already by plaintiff from the amount of damages sustained by him.

THIS was a case reserved from Special Term upon the pleadings and the evidence contained in the bill of exceptions.

In February 1860, the plaintiff filed his petition against J. Q. A. Foster and fifteen other persons, for an alleged trespass upon his property, in Campbell county, Ky., and in March, in the same year, by leave, filed his amended petition, claiming damages for the injury described in the former pleading.

Five of the defendants, B. Taylor, Hallam, Piner, Root, and Winston, filed demurrers to the petition, which, after argument, were overruled.

On the 16th of June 1862, Charles Air answered with a general denial of the allegations of the petition.

While the action was pending, an entry was made upon the minutes by the plaintiff, that he would not further prosecute his claim against four of the defendants, James Taylor, Jr., Barry Taylor, John Taylor, and James R. Hallam, as to whom the action was dismissed.

Subsequent to this, Berry, Winston, Root, and Air filed answers,

to portions of, which the plaintiff demurred, and his demurrer was afterwards overruled. In March 1866, the plaintiff, by leave, filed an amended petition, in which he set forth that in October 1859, at Newport, Ky., he was the owner and in possession of several printing presses, and divers articles attached to his printing establishment, including a large quantity of type, of the value of ten thousand dollars, which the defendants had unlawfully taken and converted to their own use, for which sum he asked judgment. To this last amended petition the defendants Winston, Berry, Air, and Root severally answered, denying the matters alleged against them generally, and setting up, as a bar to the action against them, "that since its commencement the plaintiff had, in consideration of $1500, paid to him by J. R. Hallam, Barry Taylor, and James Taylor, Jr., who were originally their co-defendants in the action, settled, released, and discharged said defendants, from whom said sum was received, from any and all liability for the wrong and injury committed by them, and, as they were all joint trespassers, the release of those parties discharged all the wrongdoers." To this last allegation in their answer the plaintiff replies by a denial of the whole statement.

On these pleadings the case was tried before a jury. The evidence, which is fully contained in the bill of exceptions, was submitted to the jury, and a verdict rendered in favor of the plaintiff for $2556 against all the defendants remaining on the record.

To establish the fact of the release alleged in the answer, written and oral testimony was heard, which was uncontradicted, but the effect of which, the judge, who tried the cause, held to be a legal question only, and directed that a verdict should be rendered upon the whole evidence offered to establish the plaintiff's right to recover, as well as that of the defendants to oppose it, subject however, to the opinion of the court, on the law arising upon the alleged release.

The defendants afterwards severally moved for a new trial.

Stallo and Kittredge, for plaintiff.

Jordans and Jackson, for defendants.

The opinion of the court was delivered by

STORER, J.—The important question for us to consider, as the counsel upon both sides admit, is, what was the effect of the entry

by which four of the defendants were dismissed from the action; does it apply only to those named, or does it extend to all the defendants?

The entry is, in substance, this: "The plaintiff comes and makes to the court known that he is unwilling further to prosecute this action against the parties described, and thereupon they are adjudged to go hence without day, and as to them the action is dismissed, at their proportion of the costs then accrued."

It cannot be claimed that this dismissal, which is equivalent only to a judgment of *nol. pros.* at the common law, can operate either for or against the other defendants. No such effect would be produced even in a criminal case. This was held in *Rex* v. *Sergeant*, 12 Mod. 320, and is now the settled law.

We find in the early case of *Parker* v. *Lawrence*, decided in the reign of James I., Hobart 70, that the court were of opinion that a *nol. pros.* as to one or more joint trespassers, before judgment, would discharge the action. But in the next reign the case just quoted was overruled, and the court held that a discontinuance as to one defendant was a mere agreement to relinquish the action as to him only, and he alone could take advantage of it, the plaintiff being still at liberty to proceed against the other defendants: *Walsh* v. *Bishop*, Cro. Car. 243.

Since this decision the current of the law has been uniform upon the point. We find it settled in *Noke* v. *Ingham*, 1 Wilson 90; *Dale* v. *Eyre*, Id. 306; *Cooper* v. *Tiffin*, 3 T. R. 511; *Mitchell* v. *Milbank*, 6 T. R. 200.

The cases are carefully collected and approved by Sergeant Williams in his note to *Salmon* v. *Smith*, 1 Saunders 206, note 2, and establish fully the rule we have indicated, that a *nol. pros.* dismissal or discontinuance as to one defendant, before judgment, does not enure to the benefit of the others. And thus it is when an infant or a married woman are jointly sued with another, a plaintiff may enter a *nol. pros.* as to the minor or the *feme covert*, without affecting the liability of the other party to the suit: *Pell* v. *Pell*, 20 Johns. 126; *Woodward* v. *Newhall*, 1 Pickering 500.

The principle which governs all these decisions implies that the party injured by co-trespassers, or who is the creditor of co-debtors, may sue either one of the individuals against whom the action may be brought; he is not bound to prosecute all, and, although a plea in abatement is permitted in case of the non-joinder of debtors,

the privilege does not extend to tort-feasors, all are regarded as principals, and neither the omission to sue all, nor, if all are sued, the dismissal of one of them from the suit, can be pleaded by the other parties in bar.

From a very early period it has been held that the absolute release of one joint trespasser from his liability, discharges all who may have participated in the act; such is the language in Co. Litt. section 376, and contemporaneous cases of *Cocke* v. *Jenner*, Hob. 66, and *Hitchcock* v. *Thornland*, 3 Leonard 122. All united to produce the injury, there was a common purpose to be accomplished by the result, and there could be no severance of the liability. Hence, if there was a remission of his liability to one, it became the privilege of all. These decisions have since been followed by the English and American courts, wherever the state of facts warranted their application, and we need not refer to the numerous adjudications which have sustained the principle. In *Ellis* v. *Bitzer*, 2 Ohio 89, it is fully admitted.

But the release pleaded, as a discharge for all, that has been given to one only, must be a technical release, under seal, expressly stating the cause of action to be discharged, with all conditions or exceptions: *Fitch* v. *Sutton*, 5 East 232; *Rowley* v. *Stoddard*, 7 Johns. 207; *Dezeng* v. *Baily*, 9 Wend. 336; *Shaw* v. *Pratt*, 22 Pick. 305; *Mason* v. *Jouetts' Adm'r.*, 2 Dana 107; *Miller* v. *Fenton*, 11 Paige 18; *Hoffman* v. *Dunlap*, 1 Barb. 185; *Crawford* v. *Millspaugh*, 13 Johns. 87; *Seymour* v. *Minturn*, 17 Id. 169; *Couch* v. *Mills*, 21 Wend. 425; *Jackson* v. *Stackhouse*, 1 Cowen 122.

So strictly are these technicalities adhered to, that no release is allowed by implication; it must be the immediate legal result of the terms of the instrument which contains the stipulation; hence it is that a covenant not to sue, or to assert a claim, or in any manner to hold liable one joint debtor or trespasser, though it operates between the immediate parties, does not extend to the others.

Thus, in the early case of *Hitchcock* v. *Thornland*, already referred to, where it was admitted a release to one would discharge all, the distinction we have stated was recognised by ATKINSON, J.; and in *Lacy* v. *Kynaston*, 1 Lord Raym. 689, reported also in 12 Mod. 548, where the question came directly before the judges, it was held that a covenant not to sue was personal to the

covenantee only, and could not be set up by other parties. In those cases it was well observed, that such a covenant operated as a release between the parties themselves, to avoid circuity of action, but could not extend further, "as if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenants with B. not to sue him. That shall not be a release but a covenant only, because he covenants only not to sue B., but does not covenant not to sue A., against whom he still has his remedy." Late in the last century the case of *Dean* v. *Newhall*, 8 T. R. 168, was determined by Lord KENYON, where the defendant pleaded that his principal, with whom he was jointly bound, having been, as he claimed, released by an agreement under seal, which obligated the plaintiff not to sue him, and if he did, the agreement thus made "should be a sufficient release and discharge to all intents and purposes, both at law and in equity to and for the debtor, his executors, &c." It was argued that this agreement was a release of the right of action against principal and surety, but, in reply, the case we have cited from Raymond was referred to, and his Lordship, in giving the opinion of the whole court, said: "The case of *Lacy* v. *Kynaston* removes all difficulty on this subject, and is a direct authority for the plaintiff. I had only been doubting in my own mind on the strict law of the case, for that the honesty and justice of it are with the plaintiff, cannot be doubted. Even if the defendant had succeeded here, a Court of Equity would have given the plaintiff full relief. But I am glad to find, by the case cited, that we are fully warranted in deciding for the plaintiff on legal grounds." Since the determination of this case, there is not, we believe, a single reported decision, opposed to the principle it affirms, to be found in the English Courts, and we might quote cases *ad libitum* to the same point, if there could be a doubt of the correctness of our statement: *Farrell* v. *Forest*, 2 Saund. 48, note 1.

In the American courts the same rule is adhered to without exception: *McLellan* v. *Cumberland Bank*, 24 Maine 566; *McAllister* v. *Sprague*, 34 Id. 296; *Walker* v. *McCullough*, 4 Greenl. 421; *Tuckerman* v. *Newhall*, 17 Mass. 581; *Shaw* v. *Pratt*, 22 Pick. 305; *Smith* v. *Bartholomew*, 1 Metc. 276; *Brown* v. *Marsh*, 7 Vt. 327; *Durell* v. *Wendell*, 8 N. H. 369; *Snow* v. *Chandler*, 10 Id. 92; *Crane Adm'r.* v. *Alling*, 3 Green N. J. 423; *Catskill Bank* v. *Messenger*, 9 Cowen 38; *Rowley* v. *Stoddard*, 7

Johns. 207; *Couch* v. *Mills*, 21 Wend. 424; *Bronson* v. *Fitzhugh*, 1 Hill 185; *Frink* v. *Green*, 5 Barb. 455.

The courts, in the examination of the numerous decided cases, have been required to give a construction to every conceivable stipulation inserted in the agreements which have been pleaded as releases of liability, and have invariably pursued the same course in yielding nothing to mere implication, wherever words of release are found in the instrument. The intention of the parties is alone regarded, holding the established legal maxim, that where a particular purpose is to be accomplished, and language which expresses it is clear and certain, no general words subsequently used in the same agreement shall extend the meaning of the parties: *Thorpe* v. *Thorpe*, 1 Lord Raym. 235.

DALLAS, C. J., in *Solly* v. *Forbes*, 2 Brod. & Bing. 46, having examined the leading cases, observes, as courts look at the intention of the parties, in modern times more than formerly, rather than the strict letter, not suffering the latter to defeat the former, held that general words of release even, could not be operative to enlarge a previous statement which defined the particular object for which the agreement was made. The same principle is found in *Turpenny* v. *Young*, 5 Dowl. & Ry. 262, and is referred to and affirmed in *Thompson* v. *Lach*, 3 M., G. & Scott 551. See also *North* v. *Wakefield*, 13 Ad. & E. 540.

On similar grounds, it was held, in *McAllister* v. *Sprague*, 34 Maine 297, where a receipt had been given by a creditor to one of his joint debtors, which recited that the debtor had paid a certain sum in full of his half of the debt, due jointly by him and another, and which was to be his discharge in full for debt and costs, but no discharge of the co-debtor. It was decided that this could not be pleaded as a release by the other judgment-debtor, the intention of the parties being that his liability should still remain. See also *Durell* v. *Wendell*, 8 N. H. 369.

Having thus ascertained what is now the established rule in deciding the question raised by the defendant, let us now examine the facts, as they are found proved in the bill of exceptions, and to which there is no contradiction.

Before we proceed, however, it is proper to consider how far the entry on record, by which the defendants Taylor and Hallam were dismissed from the suit, can be explained or enlarged by parol evidence. The purpose is plainly stated, and as to the par-

ties named therein, it was a legal discharge from the pending proceedings, but how far it was a bar to a subsequent action, is not now a question, as counsel admit it would be barred by the statute. As the only written evidence of an arrangement between the plaintiff and these parties, is the record made at the time, and without which it would be difficult to say how these parties could avail themselves of the alleged benefit they had secured, it would seem to be inconsistent with the established rule of evidence to permit any explanation where there is neither ambiguity in the terms used, or the purpose intended to be accomplished.

But to give the testimony its full weight, the result of a careful analysis of the whole is this: During the pendency of this suit, the counsel of both parties met the father (Col. Taylor) of two of the then defendants, and with Hallam, another, the plaintiff also being present, when it was agreed that fifteen hundred dollars should be paid, and these defendants dismissed or released from the action, reserving to the plaintiff his right to proceed against the other defendants. The money was paid by Col. Taylor, and the entry referred to made accordingly.

If then, we apply the doctrine already stated, where written instruments, pleaded as releases, have been construed by the courts, we cannot perceive that the arrangement made by the plaintiff with the defendants, is without the rule.

To give it all the weight to which it is justly entitled, it must be determined upon the same principles which control every similar case, however formal may be the evidence to establish the facts.

The result of our investigation has led us all to conclude that neither the entry on the record dismissing three of the defendants from the action, or the arrangement made with the parties, which preceded that entry, and on which the agreement to dismiss was founded, can be regarded as a discharge in law of the defendants who still remain on the record.

First—Because they are not technical releases in writing sealed by the proper party.

Second—That if they could be construed as implying an agreement not to sue, they can avail only to the defendants with whom they were made, and cannot operate for the benefit of the defendants who set up the facts in discharge of the plaintiff's action against them.

Third—That the entry referred to dismisses the defendants only from the action, without reference to their co-defendants. It was the privilege of the plaintiff to have entered a *nol. pros.* or discontinuance as to any one or more of the defendants, and the dismissal in the case before us but produces the same result.

The plaintiff might have sued either of the defendants, or all, and as it would be no ground of defence that other parties were not joined, it must follow, the remaining defendants in the suit have no cause of complaint.

Fourth—That the intention of the parties, as expressed when the arrangement was made and proved by the witnesses, must be taken to qualify the agreement, and thus establish its true character, and we believe it was merely to decline to prosecute further the defendants who were dismissed, and nothing more.

Neither do the facts we have alluded to prove an accord and satisfaction, as it must be admitted, if they did, it would have the same effect as a technical release, nor do they contain the ordinary elements of what the law regards as necessary to constitute such a bar. We have been specially referred to the case of *Ellis* v. *Bitzer*, already quoted to change or greatly modify the rule we have stated, but it does not, we think, conflict with the leading principle which we suppose governs all similar cases. The courts do not there assume any new rule of interpretation, or attempt to extend the operation of that which has hitherto been received, and acted on in the trial of causes, and we find nothing inconsistent therefore, with the conclusion to which we have arrived.

Nor do we doubt, although there may be found individual judgments against joint trespassers, the plaintiff can have but one satisfaction; he must elect which of the judgments he will enforce, on the same principle, where there may be different findings by the same verdict when all the trespassers are sued, the successful party must choose "*de melioribus damnis*"—he cannot claim to collect all. It follows, then if the damages are satisfied in part, by payment, or compromise with some of the defendants, the plaintiff may still proceed against those who remain on the record, and we hold it was the duty of the judge who tried the cause at Special Term, to have instructed the jury, as he did, to deduct in their finding whatever sum the plaintiff has already received on account of his alleged injuries, from the parties who were afterwards dismissed. This was the just application of the

rule that there cannot be a double remuneration for the same wrong.

This is very distinctly stated by Judge UPHAM in *Snow* v. *Chandler*, 10 N. H. 95. It is, he says, that "the sum paid was not received in satisfaction of the damages, but only in part satisfaction, and the fact that it was coupled with an engagement not to sue, does not alter the case. But to the extent of the amount paid, the defendant may avail himself of the arrangement." See also *Merchants' Bank* v. *Curtis*, 37 Barb. 320.

We have thus traced the principle, familiar as it is, that determines this case to its source, and followed down the course of decisions to the present time, not that there was any novelty in the rule, but that we might satisfactorily determine what in reality was a legal bar to this action, and although the examination of the numerous cases, both ancient and modern, has convinced us that the old maxim, "*Melius est petere fontes, quam sectari rivulos*," has not always been regarded by the courts, we find no difficulty in arriving at the result we have reached. Not only upon the law as we hold it to be, but on the facts proved, we are all of opinion that the motion for a new trial should be overruled, and judgment entered on the verdict.

The foregoing opinion embodies the law so thoroughly, and is upon a question of so much practical importance, that we are glad of an opportunity to present it to the profession. The case turns altogether upon the effect of the *retraxit* or *nol. pros.* as to a portion of the defendants. The facts seem to be, that the plaintiff accepted $1500 of a portion of the defendants, and discontinued the suit against them, under an agreement that they should be no further prosecuted for the trespass, *but that the plaintiff should be at liberty to proceed against the other defendants.* Upon this state of facts the judge at the trial charged the jury, that the transaction did not amount to a bar of the action; but that the amount received must be considered in making up the damages against the other defendants. This seems to us both legal and equitable. It is a creditable illustration and application of the rule, that it is the duty of courts so to construe the contracts of parties as to effect their intention, if practicable.

It was a mere question, to reduce it to its simplest elements, whether what passed between the plaintiff, and the defendants let out of the action, amounted to a release of the *cause of action*, or a covenant *not to sue* these defendants. If the contract had been in writing, it might have been so drawn, through the inexperience of the draughtsman, or possibly through mere inattention, that the court must of necessity treat it as a release. If that is so, the court have no alternative but to say the contract is so defective as to render it impossible for the court to carry into effect the intention of the parties. But so long as it remains in oral evidence it is always easy to escape so disastrous a result.

The case may always be referred to the jury, and they will never experience any difficulty in finding that the parties used such terms as, on the whole, to express their obvious intent. And that, in the present case, is entirely unquestionable.

It is as certain that the plaintiff did not intend to release the cause of action, as that he did intend no further to prosecute the defendants let out of the action. There must, then, be very clear proof of the use of terms, which do, of necessity, release the cause of action, to induce the court to give them that effect, where there is not the slightest doubt, on the whole case such was not the real purpose. We should always feel more or less compassion for any judge who felt himself so effectually hampered by forms as to be driven into any such absurd consequence. The opinion seems to us creditable, both in form and substance. And we rejoice at this obvious tendency of modern common-law jurisprudence to reach obviously just results, which is the great excellence of an unwritten system of law over one that is cramped into written forms. The one is temporal and imperfect, the other eternal and complete, if wisely and fairly administered. I. F. R.

Circuit Court of the United States. District of California.

GORDON v. SOUTH FORK CANAL COMPANY.

The rule that the title of a purchaser acquired under a judicial sale will be held good, though the judgment be afterwards reversed, applies to all purchasers, whether parties to the suit or not.

By a decree of the Circuit Court, a claim was held to be a lien on an entire canal. From this decree an appeal was taken to the Supreme Court, pending which the canal was sold under the decree, and the plaintiff in the decree became the purchaser. The Supreme Court reversed the decree on the ground that the claim was a lien on a section of the canal only. *Held*, that plaintiff's title under the sale was not affected by the reversal.

COMPLAINANT filed a bill in the Circuit Court to enforce a claim for work and materials used in the construction of certain sections of defendants' canal. The court at June Term 1865, entered a decree for complainant for $76,000, declaring it a lien on the entire canal, which was ordered to be sold by a master. The sale took place in November 1865 to the assignee of the decree, and was duly confirmed by the court and a conveyance made by the master. In October 1865, an appeal was taken to the Supreme Court, but no bond filed for *supersedeas* or stay of proceedings. In March 1868, the Supreme Court reversed the decree so far as it declared the claim a lien on the entire canal, adjudging the lien to cover only the sections upon which plaintiff's work was done,